

**Littleton v Mode Pub. Relations LLC**

2023 NY Slip Op 34129(U)

May 24, 2023

Supreme Court, New York County

Docket Number: Index No. 152899/2023

Judge: Dakota D. Ramseur

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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. DAKOTA D. RAMSEUR PART 34M**

*Justice*

-----X

MATTHEW LITTLETON

Plaintiff,

- v -

MODE PUBLIC RELATIONS LLC,

Defendant.

-----X

INDEX NO. 152899/2023

MOTION DATE N/A

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38

were read on this motion to/for DISMISS.

On March 29, 2023, Plaintiff Matthew Littleton commenced this action against his former employer, defendant Mode Public Relations, LLC, seeking to recover unpaid wages and statutory damages arising out of defendant’s alleged violations of several provisions in the New York Labor Law. Defendant interposed counterclaims for breach of contract and misappropriation of trade secrets and seeks a permanent injunction enjoining plaintiff from “wrongfully and illegally” possessing those trade secrets. In this motion sequence (001), plaintiff moves to dismiss the counterclaims and defendant’s request for a permanent injunction pursuant to CPLR 3211 (a) (7). Defendant opposes the motion in its entirety. For the following reasons, the motion is granted, and these causes of action are dismissed.

Defendant’s counterclaims arise out of plaintiff’s alleged breach of an “Employee Restrictive Covenant, Proprietary Information & Inventions Agreement” (hereinafter, “the confidentiality agreement”) that he signed on November 29, 2022, as part of the terms and conditions of his employment. (NYSCEF doc. no. 16, confidentiality agreement.) Therein, plaintiff agreed that “Employee will hold in the strictest confidence, Employee will not use, and Employee will use Employee’s best efforts and utmost diligence not to disclose or allow disclosure of Proprietary Information, except in the proper performance of Employee’s duties to company.” (*Id.* at ¶ 1 [a].) “Proprietary Information” is then defined as “Trade Secrets, other information identified as confidential..., and all work product.” (*Id.* at ¶ 1 [b].)

In its Answer with Counterclaims, defendant alleges that plaintiff sent an email from his personal Gmail account with “Amanda’s Docs” in the email’s body (Amanda Carter is the founder of Mode Public Relations) and several pdf documents attached, including an invoice addressed to her and several IRS forms. (NYSCEF doc. no. 5 at ¶ 78, answer with counterclaims.) In addition, defendant alleges that, on March 7, 2023, plaintiff sent an email from his work account to his personal Gmail account with a zip file containing spreadsheets and

other documents with lists of the names, affiliations, and contact information of over 1700 editors, writers, and other individuals important to its business. (*Id.* at ¶ 79.) Defendant alleges that the two emails contained confidential, proprietary information, covered by the plaintiff's confidentiality agreement (*id.* at ¶ 83), that plaintiff sent these emails without permission and not in furtherance of any legitimate duty to defendant (*id.* at ¶ 87), and, therefore, he breached his contractual obligations to not use the information except in the proper performance of his duties. (*Id.* at 88.) Defendant's misappropriation of trade secrets counterclaim relies on the same allegations:

“The files and documents, and the information contained therein, that Plaintiff took into his personal possession are of a type and nature that make them particularly damaging to Defendant if they were to be disclosed to a competitor, and would in turn benefit a competitor or Plaintiff himself, if he has or were to utilize them.” (*Id.* at ¶ 92.)

As to remedies, defendant seeks a permanent injunction barring plaintiff's possession, use, and dissemination of its proprietary information and trade secrets. (*See id.* at ¶¶ 94-98, third counterclaim for injunctive relief.)

### *Legal Standard*

On a motion to dismiss for failure to state a cause of action under CPLR 3211 (a) (7), courts afford the pleadings a liberal construction, accept the facts as alleged in the complaint as true, and give the plaintiff the benefit of every possible favorable inference. (*Leon v Martinez*, 84 NY2d 83, 87 [1994]; *JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 NY3d 759, 764 [2015].) A court's inquiry is limited to assessing the legal sufficiency of the plaintiff's pleadings; accordingly, its only function is to determine whether the facts as alleged fit within a cognizable legal theory. (*JF Capital Advisors*, 25 NY3d at 764.)

### *Breach of Contract Counterclaim*

To plead a counterclaim for breach of contract, here, defendant must demonstrate (1) the existence of a contract, (2) its performance thereunder, (3) plaintiff's breach, and (4) resulting damages. (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010].) Where a party alleges a breach but not any resulting damages, the cause of action should be dismissed. (*See Gordon v Dino De Laurentiis Corp.*, 141 AD2d 435, 436 [1st Dept 1988] [“In the absence of any allegations of fact showing damage, mere allegations of breach of contract are not sufficient to sustain a complaint.”]) Further, the damages alleged cannot be “merely speculative, possible or imaginary, but must be reasonable certain and directly traceable to the breach” (*Kenford Co. v County of Erie*, 67 NY2d 257, 261 [1986]; *see also Apogee Handcraft, Inc. v Verragio, Ltd.*, 155 AD3d 494, 495 [1st Dept 2017] [dismissing counterclaim where allegations of damages were “unduly speculative”]; *Pitcock v Kasowitz, Benson, Torres & Friedman*, 74 AD3d 613, 615 [1st Dept 2010] [finding cause of action properly dismissed given the vague, boilerplate allegations of damages]; *XL Diamonds LLC v Rosen*, 202 NY Slip Op 34050[U] at \*3-4 [Sup. Ct. NY County 2020] [dismissing cause of action for breach of a confidentiality

agreement where the plaintiff failed to allege any damages flowing from the breach and that plaintiff's theory of damages—"that damages have occurred and irreparable harm is transpiring"—was "too vague and speculative to support the claim.") Here, like in *XL Diamonds*, defendant's allegations as to damages—that it "has been severely damaged by plaintiff's wrongful conduct"—suffer from the same shortcomings, namely, that they are too vague, speculative, and conclusory to support a breach of contract cause of action. Simply put, defendant has not laid out how plaintiff's retention of documents on his personal email accounts caused damage to its business. Accordingly, since the Court grants plaintiff's motion to dismiss this cause of action on grounds that defendant has not adequately pled element (4), it need not address plaintiff's arguments related to (1) through (3). Nonetheless, the Court grants the motion without prejudice to provide defendant with the opportunity to replead damages. (*See TSL (USA) Inc. v Oppenheimer Funds, Inc.*, 113 AD3d 410, 410 [1st Dept 2014] [finding motion court properly dismissed, without prejudice, the breach of contract claims as premature where the plaintiff's damages were "too speculative to determine at this juncture."])

### *Misappropriation of Trade Secrets Counterclaim*

To properly plead a misappropriation of trade secrets cause of action, defendant must allege that (1) it possessed a trade secret, and (2) plaintiff *used* that trade secret in breach of an agreement, confidence, or duty, or as a result of improper means. (*E.J. Brooks Co. v Cambridge Sec. Seals*, 31 NY3d 441, 452 [2018]; *Tri-Star Light. Corp. v Goldstein*, 151 AD3d 1102, 1106 [2d Dept 2017].) Even assuming that the emails contain what courts consider trade secrets, defendant does not allege that plaintiff distributed the documents to competitors and outside parties or otherwise used the documents he retained in contravention of the confidential agreement. The conditional language that defendant uses in describing its injury makes this point clear: the files and documents "are of a type and nature that make them particularly damaging to Defendant *if they were disclosed*" and that plaintiff "*would benefit...if he has or were to utilize them.*" (NYSCEF doc. no. 78 at ¶ 92.)

Defendant's opposition relies exclusively on *Haque v Sound Point Capital Mgt. LP* (2018 NY Misc. LEXIS 2667 at \* 7 [Sup. Ct. NY County 2018]), where, in a breach of contract action, the court rejected "Haque's argument that Sound Point must show that he actually and improperly transferred to a third-party [the alleged trade secrets]." There are two problems with relying on *Haque* and this one statement. First, it is not entirely unclear why the court rejected such an argument since this statement is unaccompanied by a rationale or other authorities. Accordingly, its persuasiveness is quite limited. Second, the cited quotation derives from the portion of the court's discussion concerning a *preliminary injunction* and whether Sound Point had demonstrated a likelihood of success on the merits of its breach of contract claim—not a misappropriation claim. The court's ensuing discussion has two relevant aspects: (1) Hague likely breached the provision in his confidentiality agreement that provided he shall not "use [trade secrets] for your own purposes"—as opposed to the provision in which he shall not "knowingly, divulge, furnish, or make available to any third Person [trade secrets]" (*Id.* at \* 7), and (2) Hague began downloading documents relating to Sound Point's investments, memos, strategies, talking points, models, business plans, investor presentations, etc. as his departure date from the company approached, giving rise to the assumption that he intended to divulge such documents to his future employer. (*Id.* at n3.) In this context, though the court is not explicit, it

appears that Sound Point was not required to show Haque had *already* “actually and improperly” divulged the trade secrets to outside parties to obtain a preliminary injunction; rather, it only had to show that Haque sent documents to himself in violation of a provision in his employment contract that explicitly stated he shall not “use [the data] for your own purposes” and that his conduct indicated he would likely disclose those documents in the future. The different contexts—a preliminary injunction motion and its focus on future injury versus a motion to dismiss and the adequacy of a pleading based on past conduct—limit *Haque*’s applicability.

As such, since defendant has not alleged facts that indicate plaintiff intends to reveal the contents of the two emails, the Court finds that it must allege, as with all misappropriation of trade secrets cause of action, that plaintiff, in fact, *used* (divulged, distributed, transferred, etc.) trade secrets in breach of a contractual provisions. (*See Beverage Mktg. USA, Inc. v South Beach Beverage Co., Inc.*, 58 AD 657, 657-658 [affirming dismissal where “the defendants demonstrated that this information was available in the marketplace and, in any event, with respect to pricing and cost information and distribution plans and strategies, that they did not make use of it”]; *Fareportal, Inc. v Ware*, 2018 NY Slip Op 32081[U] at \* 15 [Sup. Ct. NY County 2018] [“Since Fareportal has failed to demonstrate that the information it describes are trade secrets, it is unlikely to succeed on the merits of its third cause of action. Moreover, Ware did no more than email documents to himself, which, in and of itself, does not constitute misappropriation”], citing *Eastman Kodak Co. v Carmosino*, 77 AD3d 1434, 1436 [4<sup>th</sup> Dept 2010] [“Although plaintiff alleged that defendant downloaded confidential company documents after his termination, plaintiff failed to set forth evidence establishing that defendant misappropriated confidential information”]; *North Atl. Instruments, Inc. v Haber*, 188 F3d 38, 47-48 [2d Cir. 1999] [finding plaintiff demonstrated likelihood of success on misappropriation claim where employee began calling former clients on behalf of new employer].) Accordingly, since defendant has not alleged any misappropriation of trade secrets, this cause of action is also dismissed.

### *Permanent Injunctive Relief*

While it is permissible to plead a cause of action for a permanent injunction, injunctive relief is simply unavailable when the party seeking such relief has no remaining substantive causes of action. (*Weinreb v 37 Apts. Corp.* (97 AD3d 54, 58-59 [1st Dept 2012].) This is because permanent injunctive relief is a remedy dependent on the merits of the substantive claims asserted. (*Id.*, quoting *Corsello v Verizon N.Y., Inc.*, 77 AD3d 344, 368 [2d Dept 2010].) Accordingly, since the Court has dismissed defendant’s two substantive counterclaims, the Court is also required to dismiss its counterclaim seeking a permanent injunction. But even were this not the case, defendant has not alleged sufficient facts demonstrating the availability of permanent injunctive relief. There is simply no “violation of a right presently occurring, or threatened and imminent” (*see Elow v Svenningsen*, 58 AD3d 674, 675 [2d Dept 2009]), and “there is no indication in the record that [plaintiff] will misappropriate trade secrets in the future” (*see Continental Indus. Group, Inc. v Ustuntas*, 211 AD3d 601, 603-604 [1st Dept 2022]; *Merkos L’Inyonei Church, Inc. v Sharf*, 59 AD3d 403, 408 [2d Dept 2009] [“Injunctive relief is to be invoked only to give protection for the future...to prevent repeated violations, threatened or probable, of the [party’s] property rights (citations omitted).”])


Accordingly, for the foregoing reasons, it is hereby

ORDERED that plaintiff Matthew Littleton’s motion to dismiss defendant Mode Public Relations, LLC’s counterclaims for breach of contract, misappropriation of trade secrets, and permanent injunctive relief pursuant to CPLR 3211 (a) (7) is granted and these causes of action are dismissed; and it is further

ORDERED that counsel for the parties shall appear at 60 Centre Street, Courtroom 341 at 9:30 a.m. on December 19, 2023, for a status conference with the Court; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order, along with notice of entry, within ten (10) days of entry.

This constitutes the Decision and Order of the Court.

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DAKOTA D. RAMSEUR, J.S.C.

5/24/2023  
DATE

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE